

**The German School Society, Washington, D.C.,  
d/b/a The German School of Washington, D.C.  
and Employees Association of the German  
School, Washington, D.C., Petitioner. Case 5-  
RC-11486**

March 29, 1982

# DECISION AND DIRECTION OF ELECTIONS

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

Upon a petition for representation filed on April 1, 1981, under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Arlene C. Thorne on various dates between May 5 and May 15, 1981. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Acting Regional Director for Region 5, this proceeding was transferred to the Board for decision. Thereafter, briefs were filed by the Employer and the Petitioner and Intervenor (Vertrauensrat der Deutschen Schule Washington (Trustee Council of the German School, Washington, D.C.)).

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record<sup>1</sup> in this case, the Board finds:

## I. THE BOARD'S JURISDICTION

The parties stipulated, and we find, that the Employer, The German School Society, Washington, D.C., an unincorporated voluntary association, is a private nonprofit educational institution licensed to do business in the State of Maryland, with its principal place of business located in Potomac, Maryland. During the preceding 12-month period, the Employer derived gross revenues in the course of conduct of its operations in excess of \$1 million, including contributions from the Federal Republic of Germany, but excluding contributions which, because of limitations by the grantor, were not available for operating expenses. During the same 12-

month period, the Employer received gross revenues in excess of \$50,000 directly from points located outside the State of Maryland for the performance of services.

The Employer contends, however, that the Board is without jurisdiction in this matter because: (1) it does not control the conditions of employment and is not the employer; (2) it is dominated and substantially controlled by the Federal Republic of Germany, which is exempt from our jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et seq.*; and (3) it is not engaged in "commerce" within the meaning of the Act. The Employer further contends that the Board should exercise its discretion and as a matter of policy should not assert jurisdiction because of the Employer's intimate connection with the government of the Federal Republic of Germany. For the reasons set forth below, we shall assert jurisdiction over the Employer's operations.

### A. The Nature of the Employer's Operations

The record reveals that the Employer operates a private, nonprofit school. The school offers courses of instruction in grades kindergarten through 13, is open to the general public, and is accredited by the Maryland State Department of Education. The school has an enrollment of approximately 720 students, of whom about two-thirds are German nationals whose parents are employed by the Embassy of the Federal Republic of Germany, other agencies of the Federal Republic of Germany, or international organizations such as the World Bank and the International Monetary Fund. The school operates in two buildings located in Potomac, Maryland. Both of the facilities, as well as the real property on which those facilities are sited, are owned by the Federal Republic of Germany and are exempt from local taxation. For the school year 1980-81, the school's total gross receipts were \$1,497,575, including \$909,145 in tuition, \$209,680 from bus fees, \$13,140 in membership fees, \$9,150 from other private sources, and \$356,460 in direct subsidy payments from the Federal Republic of Germany. The school's budget for the 1981-82 school year anticipates gross receipts of \$1,702,590, including \$1,075,520 in tuition, \$15,400 in membership fees, \$11,000 from other private sources, \$235,800 from bus fees, and \$364,870 in direct subsidy payments from the Federal Republic of Germany. In addition to the direct subsidies, the Federal Republic of Germany provides the school's two buildings to the Employer on a rent-free basis, and also assigns approximately 22 teachers from Germany to the school at no cost to the Employer.

<sup>1</sup> On June 10, 1981, the Employer filed a request to correct the transcript. By letter dated June 12, the Board's Deputy Executive Secretary informed all parties of their right to file objections or comments regarding the Employer's request. No such objections or comments have been received. Accordingly, the Board grants the Employer's request in its entirety.

er.<sup>2</sup> The Employer approximates the value of these items at \$704,419 per annum and \$1,210,000 per annum, respectively.

The Employer's articles of association provide that any person may become a member who submits a written application supported by two members of the society and who gives a "written undertaking" to pay an amount of \$5 annually.<sup>3</sup> The Employer's articles of association further provide that students can be admitted to the school only if the person responsible for their education is a member of the society; that a meeting of members must be held at the beginning of each school year; and that the functions of the annual membership meeting are, *inter alia*, to decide on the draft budget submitted by the school board for the new school year, to decide on the purchase or sale of assets, to decide on proposals of the school board and members, and to elect a new school board. Additionally, the articles provide that the duties of the school board are, *inter alia*, to generally represent the interests of the Employer both internally and in relation to outside parties, and specifically to discuss and formulate budget estimates for the new fiscal year; to appropriate necessary funds for operation of the school and supervise observance of the budget; to make and receive legal statements and perform legal acts on behalf of the Employer; to determine the character and structure of the school; to approve school regulations, the service instructions, and the syllabuses; to decide on applications for reduction of tuition fees; and, most importantly, "to appoint and dismiss the (p)incipal, the teachers, and the employees of the (s)chool." However, the articles also require that decisions regarding the character and structure of the school, or decisions entailing financial consequences, be taken "in agreement with the head of the foreign mission of the Federal Republic of Germany, if that mission makes contributions from its budget."

As of the hearing date in this matter, the Employer employed 79 individuals, including 3 stipulated supervisors. Of these individuals, 57 are locally hired, including 33 teachers, 1 librarian, 1 stipulated supervisor, 11 bus drivers, and 11 administrative personnel, 3 of whom were stipulated to be "confidential" employees. The remaining 22 individuals, including 2 stipulated supervisors, are teachers from the Federal Republic of Germany who are on temporary assignment to the school. Each of these "assigned teachers" must be a "*Beamter*" civil servant of a State of the Federal Republic of Germany. The distinguishing characteristic of a *Beamter* civil servant is that he has life-

time tenure in his job. A *Beamter* teacher interested in teaching for the Employer files an individual application with the Central Office for German Schools Abroad, an agency of the Foreign Office of the Federal Republic of Germany, hereinafter referred to as the Central Office. This application is then reviewed and matched against the Employer's previously filed requests. The Employer's requests are filed prior to the start of each school year and reflect its anticipated needs both in terms of the number of assigned teachers requested and the subject areas in which those teachers should be qualified. The Central Office then selects two or three applicants for each vacant assigned teacher position and forwards their files to the Employer. Sometimes the applicants receive personal interviews with an Employer official but the more frequent practice appears to be for the Employer to base its hiring decisions on the contents of the files forwarded by the Central Office, together with some telephonic communication. In either event, once the Employer has chosen an applicant from the names forwarded by the Central Office, the chosen applicant and the Employer enter into a 3-year contract, subject to the applicant receiving a leave of absence for that period from his home state's school system. The executed contract is then forwarded to the Central Office for approval. The contract specifies, *inter alia*, the subject matter and number of hours the individual will be required to teach, certain conditions regarding contract extensions, limitations on outside employment, and a mediation procedure.<sup>4</sup>

Assigned teachers employed by the Employer are paid by the Central Office. Their salaries are paid in German marks and are deposited directly into their bank accounts in the Federal Republic of Germany by the Central Office. In addition to salaries, the assigned teachers receive additional benefits from the Central Office such as a housing allowance, a cost-of-living adjustment, a medical allowance, child support payments, and death benefits. While working for the Employer, the assigned teachers pay income taxes to the Federal Republic of Germany, but pay no taxes to the United States Government or the governments of the several States. The salaries and other compensation received by the assigned teachers, like all *Beamter* civil servants in Germany and elsewhere, are set by the government of the Federal Republic of Germany and enacted into law by the sovereign. Al-

<sup>2</sup> The status of these German-assigned teachers is discussed *infra*.

<sup>3</sup> The articles also provide for certain "honorary members."

<sup>4</sup> Several of the Employer's officials, including the principal and vice principal, also are *Beamter* civil servants. These officials are hired by the Employer through the same procedures used for hiring assigned teachers, except that individuals applying to be officials always receive personal interviews from members of the school board or the society.

though *Beamter* civil servants are prohibited by law from being represented by a union for purposes of collective bargaining, their collective interests are represented by the "*Beamtenbund*" (Association for Lifetime Civil Servants), a voluntary association which acts as a lobbying group.<sup>5</sup> Through its lobbying efforts, the *Beamtenbund* often has been successful in convincing the government of the Federal Republic of Germany to accept and apply to the *Beamter* civil servants the monetary adjustments negotiated between that government and the Union Federation for German Salaried Employees covering nontenured employees of the Federal Republic.

In addition to the assigned teachers, the school employs approximately 34 locally hired teachers. The Employer hires these individuals without consultation with the Central Office. Each locally hired teacher has an individual employment contract with the Employer similar to, but broader in scope than, the contracts for assigned teachers. The Employer determines the salaries and fringe benefits to be received by each locally hired teacher, although the Central Office must approve the proposed salaries.<sup>6</sup> The other locally hired employees are hired, fired, and compensated by the Employer without input from the Central Office.

As noted above, the school is approved by the Maryland State Department of Education in accordance with state laws and regulations governing private educational institutions. The applicable state laws and regulations require that the school meet certain minimum qualification standards governing, *inter alia*, student-teacher ratios, library holdings, minimum number of school days per year, minimum number of teaching hours per day, minimum instructional requirements,<sup>7</sup> and financial reporting and audits. To review and enforce these requirements, the State Department of Education conducts regular onsite inspections, which include classroom visitation. The school's accreditation by the State of Maryland permits it to award a Maryland high school diploma to those students who successfully complete the 12th grade. Graduation from the school, however, takes place at the completion of the 13th grade. Most of the school's students attend universities in the Federal Republic of Germany following graduation. In order to be admitted to such universities, the students must successfully pass the *Abitur*, a written examination

given at the end of the 13th grade. Officials from the Federal Republic of Germany supervise the administration of the *Abitur*, which is also administered to students in schools in the Federal Republic.

#### B. The Board's Statutory Jurisdiction

At the hearing, the parties entered into the following stipulation concerning the Employer's commerce statement:

The German School Society, Washington, D.C., doing business as the German School of Washington, D.C., a private, non-profit educational institution whose principal place of business is located at 8617 Chateau Drive, Potomac, Maryland, is licensed to do business in the State of Maryland. During the preceding twelve-month period, the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., in the course and conduct of its operations, derived gross revenues in excess of \$1 million, including contributions from the Federal Republic of Germany, but excluding contributions which, because of limitation by the grantor, are not available for operating expenses. During the same preceding twelve-month period, the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., in the course and conduct of its operations, received gross revenues in excess of \$50,000 directly from points located outside the State of Maryland for the performance of services.

These stipulated facts are sufficient to warrant our finding that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. In *Cornell University*, 183 NLRB 329 (1970), the Board held that it would assert jurisdiction over nonprofit educational institutions where their operations have a substantial impact on interstate commerce, despite the fact that such institutions do not engage in purely commercial activities. Thereafter, in *Shattuck School*, 189 NLRB 886 (1971), the Board determined that it would assert jurisdiction over nonprofit secondary schools which meet the dollar volume standards applicable to nonprofit colleges and universities published at Section 103.1 of the Board's Rules and Regulations, Series 8, as amended; i.e., secondary schools which have a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than \$1 million. Clearly, the Employer's operations satisfy our jurisdictional

<sup>5</sup> Apparently, an unknown number of the Employer's assigned teachers belong to either the *Beamtenbund* or a similar association, the "*Gewerkschaft fuer Erziehung und Wissenschaft*" (Union for Education and Science), hereinafter referred to as GEW.

<sup>6</sup> Such approval has never been withheld.

<sup>7</sup> This includes minimum credit requirements in English and United States history, which the Employer admits it would not otherwise provide.

standards. It is also plain that the Employer is not within the terms of any of the statutory exclusions contained in Section 2(2) of the Act, and we find that we have the statutory power to assert jurisdiction herein.<sup>8</sup> *State Bank of India*, 229 NLRB 838, 840-841 (1977). Accord: *S K Products Corp.*, 230 NLRB 1211 (1977); *Alcoa Marine Corporation*, 240 NLRB 1265 (1979).

The Employer further argues, however, that it does not have sufficient control over the salaries, wages, hours, and other terms and conditions of employment of its employees to enable it to bargain meaningfully with a labor organization, citing *National Transportation Service, Inc.*, 240 NLRB 565 (1979). To the contrary, the Petitioner argues that both the record and Board precedent make it clear that the Employer can engage in meaningful bargaining about the terms and conditions of its employees' employment. We agree with the Petitioner. Initially, we stress that the Employer concedes that it can bargain, without limitation or restriction from the Federal Republic of Germany, over the wages and terms and conditions of employment applicable to its 11 administrative employees, 11 bus drivers, and 5 kindergarten teachers, all of whom are hired locally without input from the government of the Federal Republic and paid by funds from tuition moneys under the exclusive control of the Employer. With respect to the remaining locally hired teachers,<sup>9</sup> the record clearly establishes the Employer's ability to engage in meaningful bargaining with a certified representative concerning those teachers' wages, hours, and working conditions. The locally hired teachers are hired and disciplined by the Employer without interference from the government of the Federal Republic of Germany, and the Employer has the sole discretion to determine whether to renew or terminate the locally hired teachers' employment contracts at the conclusion of each school year. In the past, the locally hired teachers have been represented by the Intervenor in informal negotiations with the Employer. These negotiations have resulted in a salary schedule tied to wages received by public school teachers in Montgomery County, Maryland, the situs of the school; subsequent cost-of-living increases; a health insurance plan; a retirement system; procedures for teachers' evaluations;<sup>10</sup> increased liability insurance; certain curriculum changes; reduced working hours; and a modified

school calendar. Additionally, the terms of the individual employment contracts between the Employer and each assigned teacher are the product of negotiations between the Employer and the Intervenor. Some of these items, however, including the salary schedule and the content of the individual employment contracts, were agreed to by the Employer subject to the approval of the Central Office. In any event, the record indicates that even in those areas where the Employer's articles of association require agreement of the government of the Federal Republic of Germany described *supra*, the Employer is able to negotiate with a labor organization representing its employees concerning those items which will be submitted to that government for its approval.<sup>11</sup> Furthermore, we find that the remaining discretion left to the Employer under its articles of association and other applicable regulations is broad enough to permit good-faith bargaining over substantial terms and conditions of employment.<sup>12</sup>

Similarly, we also find that the Employer retains sufficient discretion over the terms and conditions of employment of the Employer's assigned teachers to permit good-faith bargaining with a labor organization representing those employees. As set forth above, there is no dispute but that the Federal Republic of Germany sets and enacts into law a salary schedule and certain fringe benefit allowances applicable to all *Beamter* civil servants, including the Employer's assigned teachers. It is further undisputed that, as *Beamter* civil servants, the assigned teachers enjoy lifetime job tenure in their job positions in the Federal Republic, that the Central Office sets the maximum number of hours per week that the assigned teachers may be required to teach, and that the government of the Federal Republic retains the exclusive right to promote or demote the assigned teachers. However, it appears that the Employer could bargain about granting the assigned teachers other fringe benefits (e.g., additional holidays), supplementary salary compensation payable from tuition moneys,<sup>13</sup> or reduced teaching hours in exchange for assumption of extra-curricular duties. Additionally, it is clear that the Employer retains considerable discretion to engage in meaningful bargaining concerning the assigned teachers' working conditions, including Employer-furnished liability insurance; class and homeroom assignments; scheduling of, and limitations on the

<sup>8</sup> See also *Soy City Bus Services, Division of R. W. Harmon & Sons, Inc.*, 249 NLRB 1169, 1170 (1980).

<sup>9</sup> Our discussion concerning locally hired teachers is equally applicable to the locally hired librarian.

<sup>10</sup> The agreed-upon evaluation procedures were unilaterally repudiated by the Employer shortly after the filing of the petition herein, allegedly at the behest of the Central Office.

<sup>11</sup> See *The Singer Company, Education Division, Career Systems, Detroit Job Corps Center*, 240 NLRB 965 (1979).

<sup>12</sup> *Id.*

<sup>13</sup> Such additional compensation might require Central Office approval, however, in order for the assigned teacher receiving same to avoid potential charges of "illegal practices."

amount of, student supervision outside of class such as field trip assignments; hiring and premature contract termination procedures; contract renewal procedures; department head selection procedures; school calendar; arbitration or mediation procedures; methods of compensation; and content of the Employer's annual request for assigned teachers from the Central Office. In finding that the Employer retains discretion to bargain collectively concerning the matters set forth above, we particularly note that the Employer and the Intervenor previously have negotiated agreements governing some of these subjects, including liability insurance, the school calendar, and the method by which assigned teachers are compensated.<sup>14</sup> Further, the Employer conceded at the hearing that it could compensate for any lost subsidy revenues from the Central Office by increasing the school's tuition.<sup>15</sup>

Accordingly, for all the foregoing reasons, we find that the Employer retains sufficient control over the salaries, hours, and other terms and conditions of employment of its employees to enable it to bargain meaningfully with a labor organization, and thus satisfies the *National Transportation Service, supra*, criteria.

Lastly, the Employer argues that even if the Board does have jurisdiction over its operations, the government of the Federal Republic of Germany is the employer of the assigned teachers, not the Employer herein. We find no merit in the Employer's contention. Even apart from the various controls exercised over the assigned teachers by the Employer, it is uncontroverted that each and every assigned teacher employed at the school obtained a leave of absence from the Federal Republic or one of its component states. Most important, however, is the fact that the Federal Republic itself has cautioned the assigned teachers that their employer at the school was the "School Carrier" ("*Schultraeger*")—that is, the Employer herein. Indeed, the documentary evidence introduced in the hearing of this proceeding reveals that the Central Office has cautioned applicants for assigned teacher positions that:

Neither is the Federal Republic of Germany, nor are the governments of the individual

states (i.e., of Germany) carriers of the schools abroad under consideration. [Translator's Note: "carriers" is meant for the responsible parties who found, support, and run the schools.] (sic)

Therefore, the teacher does not transfer into employment by the Federal Civil Service in working at a school abroad, but into the employment of the school carrier. Contracts of employment are made with the school carrier, the Central Office serving as the go-between.

Another document, also issued to applicants for assigned teacher positions, similarly states that:

The schools abroad which are coming under consideration for the assignment of teachers are private institutions of foreign law. The contract drawn between teacher and school holding body is of a private legal nature and forms no work relationship with the Federal Republic or of a State in the Federal Republic of Germany . . . .

Further indicating that the government of the Federal Republic disavows any employment relationship between itself and the assigned teachers is an excerpt appearing in a letter or memorandum from the Central Office to the Embassy of the Federal Republic of Germany in the United States. This letter, dated October 31, 1972, explains the implementation of the new compensation method for assigned teachers (discussed *supra*) which required that the Central Office deposit the teachers' salaries directly to their bank accounts in the Federal Republic. In pertinent part, the letter states that: "It is asked (that you) inform the teaching personnel, that the Payments-of-contract will be paid by the Central Office on behalf of the School Carrier (or by order of) and because of this the employee relationship with the School Carrier is not affected." Hence, we reject the Employer's contention that the Federal Republic is the employer of the assigned teachers.

In summary of all the foregoing, we find that the Employer meets our jurisdictional dollar standard for private secondary schools; is engaged in commerce within the meaning of Section 2(6) and (7) of the Act; is an employer within the meaning of Section 2(2) of the Act; retains sufficient control over the terms and conditions of employment of all individuals in the unit sought by the Petitioner or another labor organization under the standards set forth in *National Transportation Service, supra*; and is the sole employer of all of the employees in the petitioned-for unit, including the as-

<sup>14</sup> Thus, the record reveals that in 1972 the Employer and the Intervenor negotiated an agreement whereby the assigned teachers would be paid their entire salaries in marks within the Federal Republic of Germany. Previously, the assigned teachers received a portion of their salaries in dollars paid to them within the United States.

<sup>15</sup> That the Employer's relationship to the government of the Federal Republic of Germany may place it under handicaps or even substantial hardships in bargaining is not reason for us to refuse jurisdiction. *N.L.R.B. v. Austin Development Center, Inc.*, 606 F.2d 785, 789, fn. 8 (7th Cir. 1979), enfg. 236 NLRB 724 (1978); *Herbert Harvey, Inc. v. N.L.R.B.*, 424 F.2d 770, 778-779 (D.C. Cir. 1969), enfg. 171 NLRB 238 (1968). Cf. *Kal Leasing, Inc.*, 240 NLRB 892 (1979).

signed teachers.<sup>16</sup> Thus, we find that we have the statutory power to assert jurisdiction herein.

### C. The Board's Exercise of Discretionary Jurisdiction

The Employer contends that, even assuming that the Board has statutory jurisdiction over the operations of the school, the Board should exercise its discretion and as a matter of policy should not assert jurisdiction because the Employer is substantially controlled by the government of the Federal Republic of Germany. We disagree. Although the Board previously followed a discretionary policy of declining jurisdiction over employers operating in the United States which had a "close relationship" with an "agency" or "an instrumentality" of a foreign government,<sup>17</sup> those cases were overruled in *State Bank of India, supra*. There, we stated that:

[W]e now conclude that there is no public policy or policy of the Act which, on the ground that the employer is disclosed to be an "agency" or "instrumentality" of a foreign state, justifies us to continue to decline jurisdiction in cases affecting employees in our own country whose employer engages in commercial activity which meets the Board's standards for such enterprises.<sup>18</sup>

We find that *State Bank of India* and its progeny<sup>19</sup> are controlling herein. If there are distinctions between the situations in those cases and the facts of the case at bar, it is that there is even less reason here to decline jurisdiction. Unlike the cited cases, the Employer herein is not an "agency" or "instrumentality" of a foreign government, but rather is an unincorporated, voluntary association seated in the District of Columbia and registered in the State of Maryland to operate a private school. The school is open to the general public, accepts tuition, and provides educational services in a like manner as any other nonprofit private school. The Employer complies with many other laws of the United States and the State of Maryland including,

*inter alia*, the Fair Labor Standards Act, workers' compensation and unemployment compensation laws, state and local safety, health, and zoning regulations, and regulations of the Maryland State Department of Education, discussed *supra*.<sup>20</sup> The Employer's articles of association, relevant portions of which are set forth above, provide that it shall be operated by the membership of the German School Society and a school board elected by that membership. The school's chief operating officer, its principal, and its teachers and other employees are hired and fired<sup>21</sup> by the school board, and, as discussed above, are employees of the Employer—not the government of a foreign sovereign.

In sum, inasmuch as the employees involved in this proceeding are employed within the United States by the Employer and such Employer is engaged in commerce within the meaning of the Act, we find and conclude that it will effectuate the purposes of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION

The Employer contended at the hearing that neither the Petitioner nor the Intervenor is a labor organization within the meaning of the Act because some of their members are employed by the government or school system of the Federal Republic of Germany. The Petitioner and the Intervenor contend that they are labor organizations within the meaning of the Act. The record reveals that the Petitioner and the Intervenor admit employees to membership, that employees participate in the activities of both organizations, and that both organizations exist for the purpose of representing employees regarding the betterment of the terms and conditions of their employment. The officials of both the Petitioner and the Intervenor were elected by the employees in secret-ballot elections, and both organizations have negotiated, or have attempted to negotiate, on behalf of their members with the Employer. Since the Petitioner and the Intervenor are willing to represent employees and exist for the purpose of dealing with employers concerning wages, hours, and other terms and conditions of employment, we find that both the Petitioner and the Intervenor are labor organizations

<sup>16</sup> The fact that the assigned teachers are admitted to the United States under "A-2" visas is not determinative. Although the Employer contends that such visas are granted only to representatives of a foreign government temporarily admitted to this country to perform official duties, we note that the "A-2" visas held by the Employer's assigned teachers specifically state that those individuals are admitted in order to perform pedagogical duties for the Employer. We find, therefore, that the bare fact that the assigned teachers hold "A-2" visas does not establish that their employer, within the meaning of Sec. 2(2) of the Act, is the Federal Republic of Germany. Of course, the immigration status of the assigned teachers does not alter the fact that they, as employees in this country, are entitled to the protections of the Act. *N.L.R.B. v. Actors' Equity Association*, 644 F.2d 939 (2d Cir. 1981), *enfg.* 247 NLRB 1193 (1980).

<sup>17</sup> See *British Rail-International, Inc.*, 163 NLRB 721 (1967), and *AGIP USA, Inc.*, 196 NLRB 1144 (1972).

<sup>18</sup> *State Bank of India, supra* at 842.

<sup>19</sup> *Alcoa Marine Corporation, supra*; *S K Products Corp., supra*.

<sup>20</sup> See *S K Products Corp., supra* at 1213.

The Employer relies on the fact that no United States income taxes are paid by the assigned teachers. We find, however, that this evidence is entitled to little weight. We will not speculate as to the reason or reasons that such taxes are not withheld or paid. It seems equally plausible that no such taxes are payable because the income is received or "realized" in the Federal Republic, as for any other reason advanced by the Employer. In any event, we are unwilling to ascribe any probative value to evidence on this issue absent an official interpretation from the Internal Revenue Service.

<sup>21</sup> In the case of assigned teachers, the school board may ask that the Central Office recall the teacher from the school.

within the meaning of the Act. *Bally's Park Place, Inc.*, 257 NLRB 777 (1981); *Roytype, Division of Litton Business Systems, Inc.*, 199 NLRB 354 (1972); *Gino Morena, d/b/a Gino Morena Enterprises*, 181 NLRB 808 (1970).<sup>22</sup>

### III. THE QUESTION CONCERNING REPRESENTATION

A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

The Employer contends there is a contract bar to the election requested by the Petitioner by virtue of a collective-bargaining agreement allegedly in effect between the government of the Federal Republic of Germany and certain labor organizations in the Federal Republic covering the Employer's assigned teachers. We find that no such bar exists. Initially, we note that it is well settled that the party asserting that a contract is a bar to an election bears the burden of proving the facts establishing the applicability of the contract-bar doctrine. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); *Bo-Low Lamp Corporation*, 111 NLRB 505 (1955). Here, the Employer failed to satisfy that burden. Thus, as discussed above, the "collective-bargaining agreement" alleged as a bar in the instant case was not the fruit of collective bargaining, but rather was unilaterally imposed by the government of the Federal Republic and enacted into law. Further, the asserted "collective-bargaining agreement" covers only *Beamter* civil servants employed by the Federal Republic or its constituent States. The Employer's assigned teachers, however, have all taken leaves of absence from their positions in the Federal Republic and are employed in this country by the Employer. Moreover, the asserted "collective-bargaining agreement" merely enumerates the financial compensation to be paid to certain employees. In order to constitute a bar, a contract "must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; it will not consti-

tute a bar if it is limited to wages only . . . ." *Appalachian Shale Products Co.*, *supra* at 1163-64. While it is thus apparent that no contract bar presently exists, the Employer further contends that one of the German labor organizations representing *Beamter* civil servants (the GEW) has expressed an interest in also representing certain of the Employer's locally hired teachers. However, since the Employer concedes that no collective-bargaining agreement covering such employees yet exists, there is no bar. *Appalachian Shale Products Co.*, *supra* at 1162. Accordingly, we find that neither the asserted "collective-bargaining agreement" applicable to the Employer's assigned teachers nor the asserted interest of the German labor organization in representing certain locally hired teachers constitutes an obstacle to the election sought by the Petitioner.<sup>23</sup>

### IV. THE APPROPRIATE BARGAINING UNIT

The Petitioner seeks to represent a unit of all full-time and regular part-time employees employed by the Employer, including German-assigned and locally hired teachers, bus drivers, building engineers, maintenance assistants, counselors, librarians, librarian aides, and secretaries, but excluding life guards, confidential employees, guards, and supervisors as defined in the Act. Alternatively, the Petitioner is willing to proceed to an election in any other unit or units found appropriate. The Employer contends that there must be three separate units: (1) assigned teachers; (2) bus drivers; and (3) all other employees sought by the Petitioner.

As discussed in detail previously, the Employer's assigned teachers are paid salaries and other compensation as mandated by applicable laws of the Federal Republic of Germany. The record reveals, however, that in almost every other relevant consideration the assigned teachers share a community of interest with the Employer's locally hired employees. Thus, the assigned teachers perform the same duties as locally hired teachers, are supervised by the same individuals as the locally hired teachers, work side by side with the locally hired teachers and other employees, work the same hours as the locally hired employees, and have the same interests in other vital employment matters including personal liability insurance, subject assignments, student discipline, grade assignments, home-room assignments, promotions to department head positions, hiring and firing procedures, contract renewal procedures, curriculum changes, and modifications to the school calendar. Accordingly, we

<sup>22</sup> We note that the Intervenor did not intervene in this proceeding until the latter portion of the hearing, was represented in common by the Petitioner's counsel, and waived all rights to examine and cross-examine witnesses. We further note that the officials of the Petitioner and the Intervenor are nearly identical. Also, the Intervenor appeared in this proceeding only when an issue arose as to whether it was dominated by the Employer. Under these circumstances, and since the record does not clearly reflect that the Intervenor wishes to appear on the ballot along with the Petitioner, we shall not place the Intervenor on the ballot of the elections we direct *infra*. However, in the event that the Intervenor determines that it wishes to appear on the ballot, an appropriate motion may be directed to the Regional Director for Region 5. Said Regional Director shall be, and he hereby is, authorized to rule on the said motion and, in his discretion, amend the Direction of Elections accordingly.

<sup>23</sup> Thus, we find it unnecessary to decide whether our contract-bar rules are applicable to extraterritorial collective-bargaining agreements.

find that the assigned teachers share a community of interest with the Employer's locally hired teachers and other employees, and thus we shall include them in the overall unit.

With respect to the bus drivers, however, the facts reveal a lack of commonality of interests with the Employer's other employees. The bus drivers work different hours from other employees, are paid on a weekly basis rather than the monthly basis of other employees, are separately supervised, are rarely in contact with other employees, have separate lunch, assembly, and bathroom facilities, and perform their duties under different working conditions. Thus, we find that the bus drivers share a separate and distinct community of interest from the Employer's other employees, and we shall include them in a separate voting unit.

The parties stipulated, and we find, that the Employer's principal, business manager, and assistant principal are supervisors within the meaning of Section 2(11) of the Act, and should therefore be excluded from the overall unit. The parties also stipulated, and we find, that the secretary to the school board, secretary to the principal, and secretary to the business manager are confidential employees within the meaning of the Act, and similarly should be excluded from the overall unit. The parties further stipulated, and we find, that the librarian, all of the teachers, and the counselors are professional employees within the meaning of Section 2(12) of the Act, and are entitled to vote in a "self-determination" election.<sup>24</sup> Accordingly, we shall direct separate elections in the following voting groups and units:

#### Unit I

All bus drivers employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., but excluding all other employees, guards, and supervisors as defined in the Act.

#### Unit II

*Voting Group (a):* All full-time and regular part-time nonprofessional employees employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., including building engineers, maintenance assistants, librarian aides, and secretaries, but excluding all professional employees, life guards, bus drivers, confiden-

tial employees, guards, and supervisors as defined in the Act.

*Voting Group (b):* All full-time and regular part-time professional employees employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., including German-assigned and locally hired teachers, librarians, and counselors, but excluding all nonprofessional employees, confidential employees, guards, and supervisors as defined in the Act.

The employees in the nonprofessional voting group (a) will be polled to determine whether or not they desire to be represented for collective-bargaining purposes by Employees Association of the German School, Washington, D.C.

The employees in the professional voting group (b) will be asked two questions on their ballot:

(1) Do you desire to be included in the same unit as nonprofessional employees for purposes of collective bargaining?

(2) Do you desire to be represented for collective-bargaining purposes by Employees Association of the German School, Washington, D.C.?

If a majority of the employees in voting group (b) vote "yes" to the first question, indicating a choice to be included in unit II with the nonprofessional employees, the group will be so included. Its votes on the second question will then be counted with the votes of the nonprofessional voting group (a) to decide the representative for the entire unit. If, on the other hand, a majority of the professional employees in voting group (b) do not vote for inclusion, these employees will not be included with the nonprofessional employees and their votes on the second question will be separately counted to decide whether they want to be represented in a separate professional unit.

We make the following findings with regard to the appropriate units:

1. If a majority of the professional employees vote for inclusion in unit II with nonprofessional employees, we find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

All full-time and regular part-time employees employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., including German-assigned and locally hired teachers, librarians, counselors, building engineers, maintenance assistants, librarian aides, and secretaries, but excluding life guards, bus drivers,

<sup>24</sup> The Board is prohibited by Sec. 9(b)(1) of the Act from including professional employees in a unit with employees who are not professional employees unless a majority of the professional employees vote for inclusion in the unit.



confidential employees, guards, and supervisors as defined in the Act.

All bus drivers employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., but excluding all other employees, guards, and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in unit II with nonprofessional employees, we find that the following three groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time nonprofessional employees employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., including building engineers, maintenance assistants, librarian aides, and secretaries,

but excluding all professional employees, life guards, bus drivers, confidential employees, guards, and supervisors as defined in the Act.

All full-time and regular part-time professional employees employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., including German-assigned and locally hired teachers, librarians, and counselors, but excluding all nonprofessional employees, confidential employees, guards, and supervisors as defined in the Act.

All bus drivers employed by the German School Society, Washington, D.C., doing business as the German School of Washington, D.C., but excluding all other employees, guards, and supervisors as defined in the Act.

[Direction of Elections and *Excelsior* footnote omitted from publication.]